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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANDREW THOMAS GALLO, Defendant and Appellant.	G044732 (Super. Ct. No. 09ZF0061) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

Susan D. Shors, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

The trial court sentenced defendant Andrew Thomas Gallo to 51 years-to-life in state prison after a jury found him guilty of several crimes, including three counts of second degree murder, plus one count each of felony drunk driving and felony hit and run. On each of the latter charges the jury also returned true findings that defendant inflicted great bodily injury on a victim.

On appeal, defendant contends the trial judge violated his rights to due process and a fair trial by demonstrating a bias against the defense. Alternatively, he argues if the judicial misconduct claim is deemed forfeited by the failure to object at trial, he failed to receive the effective assistance of counsel.

In addition, defendant asserts three instructional error claims. First, in his supplemental brief he attacks the use of CALCRIM No. 520, defining the crime of murder, arguing it is internally inconsistent and lightened the prosecution's burden of proof on the murder counts. Second, he contends the trial court erred by refusing to give CALCRIM No. 626 concerning the lesser included offense of involuntary manslaughter based on unconsciousness. Third, he attacks the refusal to give CALCRIM No. 3425 as a defense to the hit and run charge.

We conclude each of these claims lack merit and affirm the judgment.

FACTS

Shortly after midnight, a van occupied by defendant and his stepbrother, Raymond Rivera, going eastbound on Orangethorpe Avenue struck a car driven by Courtney Stewart as Stewart's car crossed the Lemon Street and Orangethorpe Avenue intersection in the City of Fullerton. Stewart and two of her passengers, Nick Adenhart and Harry Pearson, died as a result of injuries they sustained in the collision. Jonathan Wilhite, a third passenger in Stewart's car, survived the crash but suffered severe and permanent injuries.

After the collision, witnesses saw a man get out of the van on the driver's side and leave the area. Two persons testified they saw the man talking on a cell phone as he departed. One witness claimed she heard him say, "'Oh shit. I'm in trouble.'" A short time later a police officer spotted defendant walking along the shoulder of a nearby freeway. Defendant initially attempted to flee, but the officer apprehended him. Several witnesses made an on-scene identification of defendant as the person they saw exit the van through the driver's side door. Rivera testified that after the collision he had an image of defendant sitting in the driver's seat and saying "'run bitch.'" Photographs taken after his arrest depicted abrasions on defendant's body caused by a seatbelt that indicated he was in the driver's seat when the collision occurred. While being handcuffed, defendant asked a police officer "'Are they okay,'" shook his head, and said "'My bad.'"

The Lemon Street-Orangethorpe Avenue intersection is controlled by electronic traffic signals. A police officer with expertise in collision investigations testified the signals at the intersection were functioning properly on the night of the crash. He concluded Stewart's car had a green light, while the van driven by defendant ran a red light. The prosecution also presented the testimony of a traffic accident reconstruction expert. He viewed the crash scene, inspected the vehicles, the event data recorders obtained from the van and a third vehicle that was hit in the crash, read witness statements, and prepared a report. The expert concluded that, at the time of the collision Stewart's car's speed was slightly over 43 miles per hour, while the van's speed was slightly under 66 miles per hour. The readings from the van's event data recorder indicated its brakes were not applied before the collision occurred, but there was "a backing off of the throttle" within one-tenth to two-tenths of a second before the collision.

Defendant had suffered a prior conviction for driving under the influence of alcohol and had been advised of the dangers of drinking and driving. At the time of the crash his driving privileges were suspended.

In addition, the prosecution presented evidence that on the afternoon and evening before the collision defendant and Rivera had been drinking at several establishments in the West Covina-San Gabriel area. A blood sample withdrawn from defendant after his arrest was tested and found to contain a blood-alcohol content of .19 percent. A forensic expert calculated he had a blood-alcohol level of .21 or .22 percent at the time of the collision.

The defense presented evidence suggesting defendant was not driving the van when the crash occurred. Both his father and his stepmother, the van's owners, claimed Rivera had permission to drive the van, but not defendant. Defendant's sister, who lived with him, testified she had not seen him drive a vehicle.

The defense called an accident reconstruction expert who reviewed the grand jury transcript, photographs of the collision scene, and the reports prepared by the prosecution's collision and accident reconstruction experts. The defense expert claimed the report prepared by the prosecution's accident reconstruction expert did not address the mechanical status of the vehicles involved in the crash. He also questioned the methodology and the information used to complete the accident reconstruction report. The defense also introduced a photograph taken by a police investigator on the night of the collision that depicted the red and yellow lights for northbound traffic on Lemon Street simultaneously illuminated.

A trauma specialist testified about the body's autonomic nervous system, i.e., the involuntary flight or fight response to perceived threats or danger. He claimed the flight response is preeminent and an inebriated person would be less likely to override the autonomic nervous system in a stressful situation. A physician practicing addiction medicine who interviewed defendant, concluded he suffered from alcohol dependence

and was in an alcohol-induced blackout before and at the time of the accident. The witness described a blackout as "anesthesia of the brain where people may act but not react. They are not thinking rationally. They are not behaving rationally because there's no ability to think and [weigh] good versus bad." Initially, the physician stated defendant was also in a blackout after the crash. But on cross-examination, the physician acknowledged when defendant got out of the van and fled "[t]here was no evidence that he was in a blackout" until after the police apprehended him. A criminalist called by the defense concluded defendant's blood-alcohol level when the collision occurred was between .22 and .24 percent. While a person at this level of intoxication could drive a car, it would cause confusion, disorientation, and inhibit the person's ability to make decisions.

In rebuttal, the traffic engineer testified the signals at the Lemon Street-Orangethorpe Avenue intersection were operating properly when the crash occurred. Both he and the investigator who took the photograph reflecting simultaneous illumination of the red and yellow lights for northbound Lemon Street traffic claimed this resulted from the camera being set to take a timed exposure. The prosecution's accident reconstruction expert disputed the defense claim that he used the wrong methodology and claimed he did conduct a mechanical inspection of the van.

DISCUSSION

1. Judicial Misconduct

Defendant contends the trial judge committed misconduct by "demonstrat[ing] on the record through communications concerning defense counsel, rulings favoring the prosecution and actions in front of the jury that [he] was biased against the defense . . . ."

Initially, defendant acknowledges his trial attorney did not object to the purported instances of misconduct but argues it was not necessary to do so in this case. Generally, "a defendant who fails to make a timely objection to the claimed misconduct forfeits the claim unless it appears an objection or admonition could not have cured any resulting prejudice or that objecting would have been futile. [Citations.]" (*People v. Abel* (2012) 53 Cal.4th 891, 914.) Since defendant alternatively asserts the failure to object constitutes ineffective assistance of counsel, we shall review the judicial misconduct claim on its merits. (*People v. Chong* (1999) 76 Cal.App.4th 232, 243 ["because defendant contends that [trial counsel's] failure to object and seek curative jury admonitions constituted ineffective assistance of counsel . . ., we address the merits of his claim of error"].)

A "[d]efendant has a due process right to an impartial trial judge under the state and federal Constitutions. [Citations.] The due process clause of the Fourteenth Amendment requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of the case. [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) However, "a defendant seeking relief on such a theory must establish prejudice. '"[O]ur role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial."' [Citation.] We make that determination on a case-by-case basis, examining the context of the court's comments and the circumstances under which they occurred. [Citation.] Thus, the propriety and prejudicial effect of a particular comment are judged by both its content and the circumstances surrounding it. [Citation.]" (*People v. Abel*, *supra*, 53 Cal.4th at p. 914.)

Defendant first cites comments by the trial judge at pretrial hearings where defendant requested trial counsel substitute in as his attorney of record. He claims the

trial judge "tried to discourage" him from retaining the trial attorney "and made statements on the record indicating the court believed she was not competent counsel." "A 'trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression that it is allying itself with the prosecution.' [Citations.] . . . When 'the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge . . . it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary.' [Citation.]" (*People v. Sturm* (2006) 37 Cal.4th 1218, 1233; see also *People v. Abel*, *supra*, 53 Cal.4th at p. 914.) Here, the trial judge's comments and actions occurred before trial and whatever else may be said about his conduct, it did not occur in the jury's presence. (See *People v. Burnett* (1993) 12 Cal.App.4th 469, 475 ["the instances . . . outside the presence of the jury . . . could not have prejudiced appellants"] (lead opn. of Woods, J.).) Furthermore, the court allowed the substitution of counsel. Thus, we fail to see how this incident could have caused defendant prejudice.

The majority of incidents of judicial misconduct cited by defendant relate to the trial court's rulings on evidentiary matters. But "a trial court's numerous rulings against a party—even when erroneous—do not establish a charge of judicial bias, especially when they are subject to review. [Citations.]" (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1112; see also *Liteky v. United States* (1994) 510 U.S. 540, 555 [114 S.Ct. 1147, 127 L.Ed.2d 474] ["judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"].) Defendant complains about many of the trial court's rulings, but with few exceptions, presents no argument or authority to establish they were erroneous, much less prejudicial. (*People v. Farley* (2009) 46 Cal.4th 1053, 1110 ["Although defendant summarily cites many . . . examples in his . . . brief which, he claims, illustrate that the trial court made erroneous and inconsistent rulings, he provides

no analysis to establish that the trial court abused its discretion in connection with any of these rulings"].) The evidentiary and argument portion of trial in this matter covered six court days and the trial transcript exceeds 1500 pages. Merely citing to some of the trial court's rulings and conclusorily asserting they were erroneous does not suffice to establish judicial misconduct.

Worse yet, some of defendant's complaints about the court's evidentiary rulings misstate the record. For example, he claims that during direct examination of the prosecution's accident reconstruction expert, an "objection to [the prosecutor's] question" was "overruled and [the] witness [was] instructed to answer the question as posed." Not so. The trial court overruled defense counsel's relevance objection to a question of whether the witness's "process [of conducting a collision reconstruction analysis] takes a series of months." The prosecutor then asked the witness how long it took him to perform the reconstruction analysis "in this case." The witness began to give a nonresponsive answer at which point the trial judge interjected and told the witness "just listen to the question and answer the question that's posed."

Another example of defendant misstating the record involves his assertion the trial court "completely ignored" various "defense objections." In many of these instances the trial judge did respond to the objection by either asking the witness if he understood the question, rephrasing the question himself, or directing counsel to clarify the question. The trial judge's failure to expressly rule on each ground cited for an objection does not equate with ignoring counsel's objections.

Defendant also claims the trial judge threatened defense counsel and improperly admonished her in the jury's presence. Again, he misstates the record. During cross-examination of an eyewitness waiting to make a left-turn at the Lemon Street-Orangethorpe Avenue intersection when defendant's van collided with Stewart's car, defense counsel asked, "You've had lots of accidents for blowing lights and blowing stop signs." The trial court sustained the prosecutor's objection to this question. Shortly

thereafter during the afternoon break, the prosecutor argued defense counsel's attempt to impeach the witness with his "prior criminal . . . violations and/or infractions," was inappropriate. The trial judge agreed the question was "totally improper" and told defense counsel "if it happens again, there's going to be a consequence to it." Defendant claims the trial judge's comment occurred in the jury's presence, but the trial transcript clearly reflects it happened before the jury returned to the courtroom. Two of the remaining comments cited as threats also occurred during conferences outside the jury's presence.

Moreover, even on the merits defendant's argument is unpersuasive. One admonishment of defense counsel that was made in front of the jury did not reflect judicial bias. While questioning the prosecution's accident reconstruction expert about the distance it would have taken Stewart to stop her vehicle, the witness answered, "Again, a little bit of . . . hemming and hawing because it's not relevant to what we have here." Defense counsel responded, "Let's just let this judge and jury decide what's relevant." The court interjected, describing counsel's comment as "inappropriate," striking the comment, and telling the jury to disregard it. The Supreme Court has recognized under Penal Code section 1044 "a trial court has the duty to control the trial proceedings," and "[w]hen an attorney engages in improper behavior, such as ignoring the court's instructions or asking inappropriate questions, it is within a trial court's discretion to reprimand the attorney, even harshly, as the circumstances require. [Citation.] Mere expressions of opinion by a trial judge based on actual observation of the witnesses and evidence in the courtroom do not demonstrate a bias. [Citations.]" (*People v. Guerra, supra,* 37 Cal.4th at p. 1111; see also *Liteky v. United States, supra,* 510 U.S. at pp. 555-556 ["expressions of impatience, dissatisfaction, annoyance, and even anger, . . . are within the bounds of what imperfect men and women, even

after having been confirmed as . . . judges" and "ordinary efforts at courtroom administration . . . remain immune"].) The trial judge's comments and actions in this instance fell within its authority to control the trial proceedings. (Pen. Code, § 1044.)

Finally, defendant complains about the court's interruption of defense counsel's closing argument after she displayed a slide containing a jury instruction on criminal negligence. He claims the trial judge "dramatically clear[ed] the courtroom at the very mention of negligence . . . and denigrated defense counsel in front of the jury . . . ."

Again, defendant fails to accurately describe the incident. The prosecutor objected to the slide and "ask[ed] that the jury not be allowed to view an instruction that they're not going to get." The court sustained the objection. Defense counsel then asked to "approach" the bench. Instead, the court excused the jury. Outside the jury's presence, the court ordered the exhibit removed and explained, "I made it real clear . . . yesterday that we were not going to get into arguments that involved crimes that were not before the court. And you're putting that instruction up as if to infer [*sic*] to the jury that that's an instruction I'm going to give. I'm not giving it." The court directed defense counsel to "argue [the case] within the bounds of the law and the evidence," and explained "[y]ou can talk about whatever the . . . evidence shows the conduct is. There's aspects that can be referred to as negligence. But to use instructions that are not going to be given to the jury [is] entirely misleading."

First, defense counsel asked to approach the bench to discuss the prosecutor's objection and the court's ruling on it. Instead the court excused the jury. Second, the judge's comments were not heard by the jury. As noted, "[w]hen an attorney engages in improper behavior, such as ignoring the court's instructions or asking inappropriate questions, it is within a trial court's discretion to reprimand the attorney, even harshly, as the circumstances require. [Citation.] (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1111.) Third, defendant's objection to this incident is primarily based on his

substantive complaint the court erred in refusing to instruct the jury on involuntary manslaughter as a lesser included offense. As discussed below, he is wrong on this point.

"[E]xamining the context of the court's comments and the circumstances under which they occurred," and "judg[ing] . . . both [the] content and the circumstances surrounding" each of the incidents of purported judicial misconduct (*People v. Abel, supra,* 53 Cal.4th at p. 914), we conclude defendant's judicial misconduct claim lacks merit.

2. Instructional Error Claims

a. Introduction

Defendant asserts the trial court committed three instructional errors that require reversal of his murder and hit and run convictions.

"A trial court must instruct the jury 'on the law applicable to each particular case.' [Citations.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) "The proper test for judging the adequacy of instructions is to decide whether the trial court 'fully and fairly instructed on the applicable law . . . .' [Citation.] '"In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]"' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*Id.* at pp. 1111-1112.) "[A] claim that a court failed to properly instruct on the applicable principles of law is reviewed de novo. [Citations.] (*Id.* at p. 1111.)

"'[E]ven in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence.' [Citation.] . . . In conducting this review, we first ascertain the relevant law and then 'determine the

meaning of the instructions in this regard.' [Citation.]" (*People v. Martin, supra,* 78 Cal.App.4th at p. 1111.)

b. CALCRIM No. 520

The prosecution tried defendant on three counts of murder under the theory recognized in *People v. Watson* (1981) 30 Cal.3d 290, 298 [where "conduct of the culpable party in a vehicular homicide case . . . can be characterized as a wanton disregard for life, and the facts demonstrate a subjective awareness of the risk created, malice may be implied . . . a murder charge is appropriate"]. The court gave CALCRIM No. 520 describing the elements of the crime of murder, including the requirement that the defendant act with "a state of mind called malice aforethought." The instruction defined the malice element as follows: "There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. The defendant acted with express malice if he unlawfully intended to kill. [¶] The defendant acted with implied malice if he: [¶] 1. . . . intentionally committed an act; [¶] 2. The natural and probable consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; [¶] and [¶] 4. He deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberations or the passage of any particular period of time."

In his supplemental opening brief, defendant argues "[t]he jury instructions on . . . second degree . . . murder in this case were internally inconsistent and incomplete" because "[t]he jury was told that murder requires a deliberate act," but "that no deliberation is required to prove malice." He suggests the jury should have been given the definition of deliberation appearing in CALCRIM No. 521, describing first degree

murder. The Attorney General disagrees, noting "although second degree murder requires a deliberate act to show implied malice, it does not require deliberation."

We agree with the Attorney General's analysis. First, we note the Supreme Court has approved the use of language nearly identical to that appearing in CALCRIM No. 520. In *Watson*, the Supreme Court held "second degree murder based on implied malice has been committed when a person does '"'an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life'" . . . .' [Citations.]" (*People v. Watson, supra*, 30 Cal.3d at p. 300.) Subsequent decisions have repeatedly reaffirmed this definition of implied malice. (*People v. Knoller* (2007) 41 Cal.4th 139, 152 [acknowledging earlier cases declaring "the 'better practice . . . is to charge juries . . . in the straightforward language of the "conscious disregard for human life" definition of implied malice,'" and noting "[t]he standard jury instructions thereafter did so"]; see also *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 104; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1221-1222.)

Second, it is established "Malice aforethought as required in second degree murder is not synonymous with the term deliberate as used in defining first degree murder. [Citation.] To hold otherwise would obliterate the distinction between the two degrees of murder." (*People v. Washington* (1976) 58 Cal.App.3d 620, 624.) Recently the Supreme Court reaffirmed "[s]econd degree murder is the unlawful killing of a human being with malice aforethought *but without the additional elements*, such as willfulness, premeditation, and *deliberation*, that would support a conviction of first degree murder. [Citation.]" (*People v. Knoller, supra*, 41 Cal.4th at p. 151, italics added.)

Defendant argues an instruction on "[d]eliberation is required because a purely impulsive act creating risk of great bodily injury is not sufficient to support second degree murder." But the deliberation described in CALCRIM No. 521 refers to the

perpetrator's mental process "'of careful thought and weighing of considerations'" before killing the victim. (*People v. Anderson* (1968) 70 Cal.2d 15, 26.) For implied malice murder "the mental component [is] '"the requirement that the defendant 'knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life.'"' [Citation.]" (*People v. Cravens* (2012) 53 Cal.4th 500, 508.) CALCRIM No. 520 told the jury that to find implied malice defendant needed to commit an intentional act with knowledge it was dangerous to life and to deliberately act with conscious disregard for life. Thus, it properly informed the jury the mental state necessary to support murder convictions in this case "require[ed] . . . defendant's awareness of the danger that his . . . conduct will result in another's *death* . . . ." (*People v. Knoller*, *supra*, 41 Cal.4th at p. 156.) We find no error in the court's instruction on the elements of second degree murder.

c. CALCRIM No. 626

At trial, defendant requested the court instruct the jury with CALCRIM No. 626 in connection with the murder charges. That instruction states in part: "When a person voluntarily causes his or her own intoxication to the point of unconsciousness, the person assumes the risk that while unconscious he or she will commit acts inherently dangerous to human life. If someone dies as a result of the actions of a person who was unconscious due to voluntary intoxication, then the killing is involuntary manslaughter." The trial court refused to give the instruction.

Defendant argues this ruling was error. He claims there was sufficient evidence presented at trial that he was "in a black[]out condition from alcohol ingestion and was not conscious . . . ." In a somewhat rambling analysis of the law of criminal homicide and the history of manslaughter, defendant concludes the law "must be construed so that generic involuntary manslaughter is a lesser included offense of generic implied malice murder committed with a vehicle." We disagree.

"A trial court is required to instruct 'on all theories of a lesser included offense which find substantial support in the evidence,'" but not "'on theories that have no such evidentiary support.' [Citation.]" (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1083.) In *People v. Sanchez* (2001) 24 Cal.4th 983, disapproved on another ground in *People v. Reed* (2006) 38 Cal.4th 1224, 1228-1229, the Supreme Court recognized "the long-established tradition in this state holding that manslaughter is a lesser included offense of murder" (*People v. Sanchez, supra,* 24 Cal.4th at p. 989), but held gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)) was not a lesser included offense of murder. (*People v. Sanchez, supra,* 24 Cal.4th at pp. 985, 988.) "Although it long has been held that manslaughter is a lesser included offense of murder, this tradition has not explicitly included offenses requiring proof of specific elements unique to vehicular manslaughter." (*Id.* at p. 991.) In reaching this conclusion, *Sanchez* disapproved of prior cases holding gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (b)) constituted lesser included offenses of murder. (*People v. Sanchez, supra,* 24 Cal.4th at pp. 990-991.)

Defendant acknowledges *Sanchez*'s holding also precludes relying on vehicular manslaughter under Penal Code section 192, subdivision (c) as a lesser included offense in this case. But he argues the generic forms of involuntary manslaughter contained in subdivision (b), i.e., "the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection" (Pen. Code, § 192, subd. (b)), "remain[] . . . lesser included offense[s] of a charge of murder stemming from an automobile accident." The problem with this argument is that subdivision (b) of section 192 further declares "[t]his subdivision shall not apply to acts committed in the driving of a vehicle." (*Ibid*.)

Defendant seeks to overcome this statutory obstacle by arguing we should ignore the plain language of the statute and "construe[it] to apply to a count charging

involuntary manslaughter as a substantive offense, but not when involuntary manslaughter is simply a lesser included offense of vehicular manslaughter." We find defendant's argument flawed.

First, defendant cites no authority for his interpretation of Penal Code section 192, subdivision (b). Second, the premise of defendant's argument appears to be there is a constitutional or statutory requirement to "avoid[an] unwarranted all-or-nothing choice[] for the jury" by "having some form of manslaughter apply to a homicide caused by a vehicle accident . . . ." This premise is wrong.

In *Montana v. Egelhoff* (1996) 518 U.S. 37 [116 S.Ct. 2013, 135 L.Ed.2d 361], the United States Supreme Court dealt with the constitutionality of a state law declaring "voluntary intoxication 'may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense.'" (*Id.* at pp. 39-40.) A four-member plurality found the statute valid, declaring the right to have "a jury . . . consider a defendant's intoxication when assessing whether he possessed the mental state needed to commit the crime charged" was not "so deeply rooted . . . as to be a fundamental principle which th[e Fourteenth] Amendment enshrined." (*Id.* at pp. 46, 48.) In a separate opinion Justice Ginsburg concurred in upholding the law. She distinguished between "a rule designed to keep out 'relevant, exculpatory evidence,'" which would "offend[] due process," and one that "is, instead, a redefinition of the mental-state element of the offense," and agreed "'[a] state legislature certainly has the authority to identify the elements of the offenses it wishes to punish,' [citation], and to exclude evidence irrelevant to the crime it has defined." (*Id.* at p. 57.)

California has enacted a similar statute. Penal Code section 22 declares: "(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation,

deliberation, or malice aforethought, with which the accused committed the act. [¶] (b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought. [¶] (c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance."

Relying on *Egelhoff*, several California decisions have found Penal Code section 22 constitutional. (*People v. Carlson* (2011) 200 Cal.App.4th 695, 707-708; *People v. Timms* (2007) 151 Cal.App.4th 1292, 1298-1302; *People v. Martin*, *supra*, 78 Cal.App.4th at pp. 1115-1117.) While it is defendant's theory that his intoxication resulted in an alcohol blackout that rendered him legally unconscious, where "[u]nconsciousness [is] caused by voluntary intoxication [it] is . . . governed by [Penal Code] section 22 . . . . [Citation.]" (*People v. Walker* (1993) 14 Cal.App.4th 1615, 1621, fn. omitted.)

Before 1995, Penal Code section 22, subdivision (b) provided evidence of voluntary intoxication was admissible "on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." (Stats. 1982, ch. 893, § 2, pp. 3317–3318.) In *People v. Whitfield* (1994) 7 Cal.4th 437, involving a murder prosecution arising from an automobile accident caused by an intoxicated driver, the California Supreme Court "conclude[d] that [Penal Code] section 22 was not intended, in murder prosecutions, to preclude consideration of evidence of voluntary intoxication on the issue whether a defendant harbored malice aforethought, whether the prosecution proceeds on a theory that malice was express or implied." (*Id.* at p. 451.)

Shortly thereafter, the Legislature amended Penal Code section 22, subdivision (b) so that it now provides "[e]vidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific

intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored *express* malice aforethought." (Italics added.) *People v. Martin, supra,* 78 Cal.App.4th 1107 held "[i]t is clear that the effect of the 1995 amendment to [Penal Code] section 22 was to preclude evidence of voluntary intoxication to negate implied malice aforethought." (*Id.* at p. 1114.) Subsequent cases have agreed with *Martin*. (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1375 ["The legislative history of the amendment unequivocally indicates that the Legislature intended to legislatively supersede *Whitfield*, and make voluntary intoxication inadmissible to negate implied malice in cases in which a defendant is charged with murder"]; *People v. Timms, supra,* 151 Cal.App.4th at p. 1298 ["With the 1995 amendment, voluntary intoxication is no longer admissible to negate implied malice"]; see also *People v. Boyer* (2006) 38 Cal.4th 412, 469 [recognizing in dicta that under the 1995 amendment "depending on the facts, it now appears that [a] defendant's voluntary intoxication, even to the point of actual unconsciousness, would not prevent his conviction of second degree murder on an implied malice theory"].)

Recently, in *People v. Carlson, supra,* 200 Cal.App.4th 695, we held the trial court did not err in refusing to instruct the jury with CALCRIM No. 626 in a prosecution for second degree implied malice murder arising from an automobile crash where the defendant claimed she was unconscious when the collision occurred. (*People v. Carlson, supra,* 200 Cal.App.4th at p. 702.) "While defendant seeks to rely on her purported unconsciousness to reduce her criminal culpability, her alleged blackout admittedly resulted from self-intoxication. . . . [O]ne of the reasons for amending [Penal Code] section 22, subdivision (b) in 1995 was that 'the Legislature deemed it confusing, in a vehicular homicide case, to allow evidence of voluntary intoxication to aggravate as well as to mitigate the offense.' [Citation.] This confusion is no less true where a defendant relies on his or her voluntary intoxication to assert a claim of unconsciousness." (*Id.* at p. 706.)

In this case, defendant asserts that he drank knowing he had a suspended license and was not allowed to drive the van and believing Rivera would be the driver. The defendant in *Carlson* also argued she was entitled to have the jury instructed with CALCRIM No. 626 because "she 'drank knowing that she would not be driving.'" (*People v. Carlson, supra,* 200 Cal.App.4th at p. 706.) We rejected this argument. "The problem . . . is that it is based on the premise voluntary intoxication can still negate a finding of implied malice. In *Turk* [*People v. Turk, supra,* 164 Cal.App.4th 1361] the appellate court declared: 'It is no longer proper to instruct a jury . . . that "when a defendant, as a result of voluntary intoxication, kills another human being without premeditation and deliberation and/or without intent to kill (i.e., without express malice), the resultant crime is involuntary manslaughter." This instruction is incorrect because a defendant who unlawfully kills without express malice due to voluntary intoxication can still act with implied malice, which voluntary intoxication [now] cannot negate . . . . To the extent that a defendant who is voluntarily intoxicated unlawfully kills with implied malice, the defendant would be guilty of second degree murder.' [Citation.] No reason exists to carve out an exception where a person drinks so much as to render him or her unconscious." (*People v. Carlson, supra,* 200 Cal.App.4th at p. 707.)

Consequently, we conclude the trial court properly rejected defendant's request to have the jury instructed with CALCRIM No. 626.

d. CALCRIM No. 3425

Finally, defendant argues the trial court erred in refusing his request to give CALCRIM No. 3425, applying his alleged inebriation-induced unconsciousness to the hit and run charge. That instruction declares, in part, a "defendant is not guilty of [a crime] if [he or she] acted while legally unconscious. . . ." Again, we conclude no error occurred.

"If a driver is unconscious, obviously she will not be able to comply with the [statutory] requirements . . . at the scene of the accident. . . . The reason the unconscious driver is excused from performing under the statute is that the law does not require the impossible. [Citation.] When the driver regains consciousness, compliance is no longer impossible and [he or] she must comply with the disclosure requirements of the statute as soon as reasonably possible." (*People v. Flores* (1996) 51 Cal.App.4th 1199, 1204.) But here the evidence presented at trial did not support giving this instruction. "[A] defendant has a right to have the trial court, on its own initiative, give a jury instruction on any affirmative defense for which the record contains substantial evidence [citation]—evidence sufficient for a reasonable jury to find in favor of the defendant [citation] . . . . In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.' [Citation.]" (*People v. Salas* (2006) 37 Cal.4th 967, 982.)

Defendant's theory of the case was that he was unconscious when he fled the accident. But Rivera testified to recalling that, immediately after the crash, defendant told him to "'run bitch.'" Several witnesses saw defendant get out of the van himself and, while using a cell phone, leave the crash scene. One witness testified she heard him say "'Oh shit. I'm in trouble'" as he did so. When caught by the police a short time later, defendant spontaneously asked an officer, "'Are they okay'" and, while shaking his head, described his actions as being "'bad.'" Even the defense expert who testified defendant suffered an alcohol-induced blackout, acknowledged that when defendant left the van and fled "[t]here was no evidence that he was in a blackout."

Consequently, the trial court properly refused to give CALCRIM No. 3425.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.